



## Case of the 20 Dirty Pictures

[By James Kilpatrick]

Unless the U.S. Supreme Court intervenes, Morton R. Berger will spend the rest of his life in an Arizona prison. Maybe he deserves it. Then again, maybe not. These are the facts.

In June 2002, Phoenix police arrested Berger on a state warrant charging him with sexual exploitation of a minor. Specifically, he was charged with possession of 20 photographs depicting, among other things, children being raped by adults, children engaging in sexual acts with other children, and children in sexual acts with animals. The 20 images introduced at trial were part of a large collection of pornographic images accumulated over a period of at least six years.

A jury found Berger guilty on 20 counts of sexually exploiting children under the age of 15 and sentenced him to 10 years on each count, the sentences to run consecutively. Last May the Arizona Supreme Court affirmed that judgment. One justice dissented; another expressed reservations. Last month counsel filed Berger's appeal in the U.S. Supreme Court. We will know by mid-November if the court will hear it.

There is no question of Berger's guilt. He emerges from the record as an almost classic "dirty old man." There is no evidence that he himself ever engaged in distributing, exhibiting, receiving, selling, purchasing, electronically transmitting or even "exchanging" pornographic images, all of which the Arizona law forbids. He was convicted solely of "possessing" such images. He collected them.

These facts should weigh in your calculus, for good or ill: He is 52 years old, married, a father of four, an award-winning teacher of world history. He has no criminal record of any sort. The state offered no evidence that he has ever created pornography or improperly touched a minor.

In their appeal to the Supreme Court, his counsel rely upon a single argument: The

unservable sentence violates the Eighth Amendment to the Constitution. The amendment decrees that courts may not inflict "cruel and unusual punishments." The 200-year prison sentence imposed on Berger is plainly "unusual." At that punitive level, Arizona stands alone. Its minimum 10-year sentence for possession of a single piece of child pornography is greater than the maximum sentence for this offense in 35 states. It is equal to the maximum in nine others.

Is the 200-year sentence also constitutionally "cruel"? Who is to say? Manifestly, the question is hypothetical, or academic. On the record, Berger is a middle-aged, dirty-minded, part-time pedophile. But also on the record, he has never physically harmed anyone. He never even bought any of this stuff. He merely downloaded it.

In the Supreme Court of Arizona last May, Justice W. Scott Bales held that the sentence imposed on Berger must be affirmed unless it is "grossly disproportionate" to the crime. To answer that question, he said, judges must consider (1) the sentences imposed by Arizona on other crimes of comparable gravity, and (2) the sentences imposed by other states for the same crime, i.e., possession of pornography involving juveniles.

After weighing the state's "compelling interest" in protecting children from sexual exploitation, Justice Bales voted to affirm. Justice Andrew D. Hurwitz not only concurred, he "fully" concurred — but he "reluctantly" concurred as well. If he were a legislator, he would be free to find such a long sentence "shocking to my conscience and vote for a less draconian sentencing scheme."

Justice Rebecca White Berch, dissenting in part, had the last and most sensible word. She agreed that courts must defer to legislatures on the fixing of criminal sentences, but the Constitution prohibits sentences that are "grossly" disproportionate. In this instance, Arizona's sentence for possession of pornography "is by far the longest in the nation." It is more severe than sentences imposed in Arizona on first offenders for rape or aggravated assault.

In the federal courts, Justice Berch observed, where sentencing guidelines are fixed by an extra-judicial commission, Berger would have faced only five years in prison. Arizona's sentences for possession of child pornography are "not merely disproportionate, but grossly disproportionate to the crime."

She concluded: "I do not condone Berger's crimes. Child pornography is a serious offense. ... Nevertheless, we are asked to determine in this case whether 200 years is just punishment for a defendant who possessed child pornography but directly harmed no one. The sentence provides no opportunity for rehabilitation and provides no second chance."

This is a case the high court ought to hear. Morton Berger may be a creep, but on the record he's a pretty sad creep. The sentence is absurd.

[Letters to Mr. Kilpatrick should be sent by e-mail to [kilpatjj@aol.com](mailto:kilpatjj@aol.com).]

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